JUL 13 2001 (6)

Supreme Court, U.S.
FILED
JUL 13 2001
OFFICE OF THE CLERK

No. 00-9285

IN THE

Supreme Court of the United States

WALTER MICKENS, JR.,

Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
SUSSEX I STATE PRISON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

ROBERT E. LEE
MARK E. OLIVE
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(804) 817-2970

ROBERT J. WAGNER *
LAURA L. WAGNER
WAGNER & WAGNER
700 East Main Street,
Suite 1630
Richmond, VA 23219
(804) 644-3321

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

57 pp

QUESTION PRESENTED

Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	23
I. *WOOD V. GEORGIA* GOVERNS THIS CASE AND REQUIRES POSTCONVICTION RELIEF BECAUSE OF DEFENSE COUNSEL'S ACTUAL CONFLICT OF INTEREST, WHETHER OR NOT THE CONFLICT IS SHOWN TO HAVE HAD ANY "ADVERSE EFFECT"	23
A. Under *Wood*, an actual conflict of interest that inheres in counsel's duplicitous posture deprives a criminal defendant of the assistance of counsel and voids the defendant's conviction with no need to show "adverse effect"	24
B. Mickens' appointed counsel harbored a severe, actual conflict of interest	36
II. IF A SHOWING OF ADVERSE EFFECT WERE REQUIRED, IT WOULD NOT BE THE ONE THE FOURTH CIRCUIT USED TO DENY POSTCONVICTION RELIEF IN THISCASE	46
CONCLUSION	50

TABLE OF AUTHORITIES

CASES — Page

Argersinger v. Hamlin, 407 U.S. 25 (1972) 35
Brooks v. Tennessee, 406 U.S. 605 (1972) 24
Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) 32
Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991) 38
Cuyler v. Sullivan, 446 U.S. 335 (1980) ..... *passim*
Dickerson v. United States, 530 U.S. 428 (2000) 30
Faretta v. California, 422 U.S. 806 (1975) 24
Ferguson v. Georgia, 365 U.S. 570 (1961) 25
Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) (en banc) 38
Geders v. United States, 425 U.S. 80 (1976) 25, 35
George v. Commonwealth, 242 Va. 264, 411 S.E.2d 12 (1991) 40
Gideon v. Wainwright, 372 U.S. 335 (1963) 23
Glasser v. United States, 315 U.S. 60 (1942) 25, 26, 31
Hamilton v. Alabama, 368 U.S. 52 (1961) 35
Herring v. New York, 422 U.S. 853 (1975) 25
Hess v. Mazurkiewicz, 135 F.3d 905 (3d Cir. 1998) 37
Holloway v. Arkansas, 435 U.S. 475 (1978) ..... *passim*
Johnson v. Zerbst, 304 U.S. 458 (1938) 24
Kimmelman v. Morrison, 477 U.S. 365 (1986) 24
Lipson v. United States, 233 F.3d 942 (7th Cir. 2000) 38
Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995) 37
Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) ... 38
McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429 (1988) 42
Payne v. Tennessee, 501 U.S. 808 (1991) 40
Penson v. Ohio, 488 U.S. 75 (1988) 43

TABLE OF AUTHORITIES—Continued

Page

Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) .. 33
Powell v. Alabama, 287 U.S. 45 (1932) 24, 34, 43
Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985) ... 20
Royal v. Taylor, 188 F.3d 239 (4th Cir. 1999) 20
Simmons v. South Carolina, 512 U.S. 154 (1994) 6
Smith v. Robbins, 528 U.S. 259 (2000) 43
State v. Davis, 110 Ariz. 29, 514 P.2d 1025 (1973) 31
Stoia v. United States, 22 F.3d 766 (7th Cir. 1994) 38
Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*
Swidler & Berlin v. United States, 524 U.S. 399 (1998) 39
United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990) 37
United States v. Cronic, 466 U.S. 648 (1984) 24, 34
United States v. Fahey, 769 F.2d 829 (1st Cir. 1985) 37
United States v. Malpiedi, 62 F.3d 465 (2d Cir. 1995) 33, 36
United States v. Migliaccio, 34 F.3d 1517 (10th Cir. 1994) 38
United States v. Miskinis, 966 F.2d 1263 (9th Cir. 1992) 38
United States v. Morelli, 169 F.3d 798 (3d Cir. 1999) 37
United States v. Soldevila-Lopez, 17 F.3d 480 (1st Cir. 1994) 37
Weeks v. Commonwealth, 248 Va. 460, 450 S.E.2d 379 (1994) 40
Wheat v. United States, 486 U.S. 153 (1988) 25, 26
White v. Maryland, 373 U.S. 59 (1963) 35
[Terry] Williams v. Taylor, 529 U.S. 362 (2000) .. 25

TABLE OF AUTHORITIES—Continued

	Page
Winkler v. Keane, 7 F.3d 304 (2d Cir. 1993)	37
Wood v. Georgia, 450 U.S. 261 (1981)	*passim*
CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES	
U.S. Const. amend. VI	*passim*
U.S. Const. amend. XIV, § 1	1
28 U.S.C. § 1254(1)	1
Va. Code Ann. § 16.1-305 (Michie 1996)	7
Va. Code Ann. § 18.2-31(5) (Michie 1992)	2
Va. Code Ann. §§ 19.2-264.2, 264.4(C) (Michie 1995)	6
Va. Code Ann. § 19.2-264.5 (Michie 1995)	6
OTHER AUTHORITIES	
AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908)	43
AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1983)	37
AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14 (1983)	35
AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.3 (1999)	37, 43
AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.7 (1999)	36
GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (2d ed. 1998)	35

TABLE OF AUTHORITIES—Continued

	Page
RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (American Law Institute 2000)	32
GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854)	36, 43
CHARLES WOLFRAM, MODERN LEGAL ETHICS (1986)	35
VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-19 (Michie 1992)	17

OPINIONS BELOW

The majority and dissenting opinions below are reported as *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001) (*en banc*), and reprinted in the Joint Appendix ("JA") at JA 355. They supplanted panel opinions reported as *Mickens v. Taylor*, 227 F.3d 203 (4th Cir. 2000), reprinted at JA 318. The opinion of the federal district court is reported as *Mickens v. Greene*, 74 F. Supp.2d 586 (E.D. Va. 1999), reprinted at JA 258. An opinion of the Virginia Supreme Court affirming Mickens' conviction and death sentence on direct review is reported as *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court granted certiorari and remanded in *Mickens v. Virginia*, 513 U.S. 922 (1994), and the Virginia Supreme Court then ordered a new sentencing hearing, *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995). Reimposition of the death sentence was affirmed in *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996), *cert. denied*, 520 U.S. 1269 (1997). A decision of the Supreme Court of Virginia denying a petition for a writ of habeas corpus on December 15, 1997 is unreported. It is set out at JA 126.

JURISDICTION

The Court of Appeals *en banc* issued its opinion on February 16, 2001 and denied rehearing on March 13. The *certiorari* petition was filed April 6 and granted April 16. Jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments provide:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
>
> "No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . ."

STATEMENT OF THE CASE

On August 10, 1992, a Newport News, Virginia grand jury indicted petitioner Walter Mickens, Jr. for the capital murder of Timothy Hall "during the commission of, or subsequent to Attempted Forcible Sodomy." (JA 4.) This was a capital offense by reason of the attempted forcible sodomy allegation.[1] Without that, Hall's killing would have been noncapital murder.[2]

The crime charged was a singularly ugly and terrifying one. The seventeen-year-old Hall had been found stabbed to death, his body bearing 143 "sharp force injuries" of which 25 were fatal.[3] He was lying face down on a mattress under a sheet of plywood, his body nude from waist to socks, with the legs spread apart, pubic hairs on his buttocks and some white liquid near the anus. (240 F.3d at 352.) This was in an area beneath a parking lot that sat on pilings next to an abandoned construction building on the bank of the James River. (*Ibid.*; see also JA 8-9, 15, 34.) The area could be reached from

[1] Va. Code Ann. § 18.2-31(5) (Michie 1992).

[2] The guilt-phase instructions at Mickens' trial told the jury that "[i]f you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing occurred in the commission of, or subsequent to, attempted forcible sodomy . . . [but do find a malicious, willful, deliberate, premeditated killing], then you shall find the defendant guilty of [the lesser included offense of] first degree murder" and select a sentence of life imprisonment or less (JA 58 [written Instruction 7]; *accord*: JA 60-61 [oral instructions].) See also JA 58 (charge conference) and 74 F. Supp.2d at 606 (explaining that if "Hall was killed during a sexual encounter to which he had consented, . . . [that] would have precluded capital punishment").

[3] The medical examiner described the cause of death as exsanguination from the multiple wounds. (JA 11.) She "opined that the fatal wounds may not have caused instant death, that Hall could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, he may have been conscious." (240 F.3d at 352.)

street level only by descending a steep embankment,[4] and there were no steps near by.[5]

Mickens was tried before a jury in 1993. The prosecution's evidence made a strong case that he was Hall's killer. Five days after Hall's body was found, police officers responding to the report of an assault upon a juvenile saw Mickens exiting the parking lot of the construction building (JA 27) and arrested him when he fled. (240 F.3d at 352.) He was questioned about Hall's murder and revealed knowledge that Hall had been killed with a knife. Served with a warrant for the murder and forcible sodomy of Hall, Mickens admitted guilt to the officer who handed him the warrant and later to a cellmate. The Commonwealth presented evidence of these admissions, testimony that after Hall's death Mickens sold a pair of shoes which Hall was wearing at the time of his death, and expert testimony that the pubic hairs found on Hall's buttocks and sperm found on the mattress under Hall's body were consistent with samples from Mickens. Also, two witnesses identified Mickens as a man they had observed hiding in some bushes in a park near

[4] See JA 35 ("It's a steep incline. I went down—there's a drain pipe that runs down one side of the concrete embankment, and I used the drain pipe about halfway down and then you kind of have to walk on the incline, hold onto whatever you can. . . .¶ . . . There's no steps to get down to that location."), 8 (on both sides of the parking lot overhang, there are bluffs estimated at 30 feet high rising from the river bank to street level), 9 ("I had to jump over the fence . . . . ¶ [I] came down . . . where there was an embankment . . . to the crime scene . . . . ¶ "I don't recall any [trails or] steps being there").

[5] See, *e.g.*, JA 36 (from "the dead end of 29th Street . . . where the Basic Construction lot sits, the parking area that's an overhang . . . [, y]ou can't really get to it from that area . . . "), 8 (between 25th and 30th Streets there are no steps from street level down to the river bank), 231 (between the steps in the low 20s and the steps at 30th, "[y]ou can get down by dropping off the bank").

the location where Hall was last seen alive, not far from the old construction building. (*Ibid.*)

Mickens was represented at trial by two court-appointed lawyers, Bryan Saunders and Warren Keeling. Saunders was lead counsel (74 F.Supp.2d at 599; JA 134, 156) and assumed responsibility for about ninety per cent of the work. (240 F.3d at 354; JA 199, 228; see also JA 150.) Mickens took the stand at trial and denied any involvement in the killing. (74 F.Supp.2d at 607; JA 42-56.)[6] The only evidence presented by defense counsel to support Mickens' denial of involvement was the testimony of his mother that he was

[6] Saunders and Keeling both testified at the later federal habeas hearing that Mickens had insisted on taking the stand and denying guilt despite their advice that he not take the stand. (JA 165, 180-181, 182, 240-241.) Beyond that point, their testimonies diverged sharply, creating an issue of credibility that was not resolved by the courts below. Keeling said that he and Saunders had discussed the possibility of presenting a defense based on the theory that the sexual activity between Hall and Hall's killer was consensual (JA 166 ["THE COURT: "My question is, did you discuss with Mr. Saunders the possibility of presenting as a defense to Mr. Mickens' charges that the sexual encounter started as or was consensual?" THE WITNESS: "We talked about that, Your Honor, yes, we did."]); that they probably discussed "in the context of that, if [*i.e.*, whether] Mr. Mickens was going to not testify or if he was going to change his story as to he didn't do it" (JA 165; see also JA 182); and that Saunders ultimately made the decision not to present a consent defense (JA 166-167). Saunders said that he had never discussed with Keeling what kind of a defense could be presented if Mickens did not testify (JA 240 ["Q. . . . Did you have any conversations with Mr. Keeling about what kind of defense you could present if Walter Mickens did not testify? A. Not that I'm aware of, no."]); that he never spoke with Keeling about a consent defense (JA 211 ["Q. Did you ever speak with Mr. Keeling about a consent defense? A. No. We weren't provided any information that led us to discuss a consent defense."]); and that he never considered a consent defense because there was no foundation for such a defense unless Mickens admitted killing Hall and testified to consensual sexual relations between them (JA 211-212, 243-245; see also JA 148, 153, 218-219).

home before dark every night during the period when the killing must have occurred. (JA 41-42.) Nothing was adduced to point to any alternative possible perpetrator. (74 F.Supp.2d at 610-611.)

The issue of identity was the only one contested at trial. Saunders, who handled almost the entire guilt phase (JA 158)[7] and made all tactical decisions (JA 166-167), presented no alternative argument that, *no matter who killed Hall*, the killing could have occurred in connection with a consensual homosexual liaison and was therefore not capital murder.[8] The jury disbelieved Mickens' claim that he was not the killer and convicted him of capital murder in conjunction with attempted forcible sodomy. (240 F.3d at 353.) Scant mitigation evidence was presented at the jury sentencing hearing, none of it relating to the circumstances of the offense or to the victim. (See JA 79-82.)[9] The jury returned a death sentence. (240 F.3d at 353.)

[7] See JA 5-67. Keeling's only role at trial was to examine Mickens and his mother and cross-examine rebuttal witnesses. (JA 40-58.)

[8] See JA 5-7 (opening statement), 62-69 (closing argument). Saunders did say in closing that it was implausible to believe Mickens had forced Hall to accompany him down a 30-foot bluff to the location where he was killed. But the point of this argument was not that Hall had voluntarily accompanied his killer to the place for consensual sex; it was that Mickens was not the killer because there was no way Mickens and Hall could have gotten to the site together from the area where each was last seen before Hall's death. (JA 68-69.)

[9] Mickens' mother, aunt, sister and a long-time friend testified that Mickens was well-behaved in his dealings with them and treated his sister's and friend's young children with affection and generosity. (6/4/93 Transcript 819-839.) Mickens testified that he had had a deprived childhood, took to drinking beer and sniffing glue, and committed thefts and robberies. (JA 71-77.) He reiterated his denial of any involvement in Hall's killing but said he prayed that Hall would find peace. (JA 78.)

That sentence was set aside after this Court granted *certiorari* and remanded to the Virginia Supreme Court [10] to reconsider a claim under *Simmons v. South Carolina* [11] that the sentencing jury should have been informed about Mickens' ineligibility for parole from a life sentence.[12] At a new sentencing hearing, Mickens was again represented by Saunders and Keeling. (74 F. Supp.2d at 592.) Again they presented little evidence in mitigation and none relating to the crime or to Timothy Hall.[13] The jury made both the "vileness" and the "future dangerousness" findings that are predicates for a capital sentence under Virginia law [14] and fixed Mickens' punishment at death. (74 F. Supp.2d at 592; JA 98.) The trial judge ordered a post-sentence report as the basis for the sentence review prescribed by Virginia law,[15] "to the end that the Court may be fully advised as to whether the sentence of death is appropriate and just." (JA 98; see also JA 99.) After receiving and considering a report that included a Victim Impact Statement (JA 420-422) which quoted Hall's mother as saying that his death had "shattered her world"; that "'all I lived for was that boy'"; and that she would "'never be over the way my son was killed'" (74 F. Supp.2d at 609; JA 421), the judge declined to set aside the jury's sentencing verdict. (74 F.Supp.2d at 592;

[10] *Mickens v. Virginia*, 513 U.S. 922 (1994) (per curiam), vacating *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994).

[11] 512 U.S. 154 (1994).

[12] *Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

[13] Mickens' mother testified as at the first penalty trial. A corrections officer and a counselor employed by the Virginia Department of Corrections testified that neither of them had any problems with Mickens in prison. (2/7/96 Transcript 445-458.)

[14] See Va. Code Ann. §§ 19.2-264.2, 264.4(C) (Michie 1995).

[15] See Va. Code Ann. § 19.2-264.5 (Michie 1995).

JA 99-101.) The Virginia Supreme Court affirmed,[16] and later summarily denied Mickens' petition for postconviction relief.

New counsel were appointed to represent Mickens in federal habeas corpus proceedings. (74 F. Supp.2d at 592.) While investigating Mickens' background, federal habeas counsel went to the Newport News Juvenile and Domestic Relations Court ("JDRC") to review his file. Counsel asked the duty clerk for Hall's file as well, and the clerk produced it. This file revealed that at the moment of Hall's death, attorney Bryan Saunders—the same Bryan Saunders who later served as Mickens' court-appointed lead trial counsel—had been representing Hall on charges of assault and possession of a concealed weapon that were slated for trial the following week. (240 F.3d at 353-354.)

Federal habeas counsel requested a copy of Hall's JDRC file. The clerk's supervisor refused, saying that counsel should never have been shown the file in the first place.[17] The supervisor took back the file and refused counsel further access to it. Counsel then obtained a subpoena for the file by reporting what it showed about Saunders' representation of Hall. (74 F. Supp.2d at 600, 602; JA 126-129.)

Following additional investigation, counsel filed a federal habeas petition alleging, *inter alia*, that Saunders' representation of Mickens was tainted by a conflict of interests and violated Mickens' Sixth Amendment rights. The district court held a hearing on the claim, at which these facts appeared without dispute (74 F. Supp.2d at 599 & n.8):

On February 21, 1992, Timothy Hall's mother swore out a warrant for Hall's arrest, charging him with assault and

[16] *Mickens v. Commonwealth*, 252 Va. 315, 478 S.E.2d 302 (1996), *cert. denied*, 520 U.S. 1269 (1997).

[17] Under Va. Code Ann. § 16.1-305 (Michie 1996), JDRC files are confidential and cannot be disclosed without a court order.

battery on her. On March 13, 1992, Newport News police charged Hall with possession of a concealed weapon: a serrated bread knife wrapped in paper. On March 20, 1992, Hall appeared before the JDRC, which appointed Bryan Saunders to represent him on these two charges and continued the case until April 3. (240 F.3d at 354; 74 F. Supp.2d at 599.)

At some time between March 20 and March 28, Hall came to Saunders' office, where Hall and Saunders conferred for fifteen to thirty minutes. (240 F.3d at 354; 74 F. Supp.2d at 599.) The district court found that this attorney-client interview "was confined to the circumstances surrounding each of the charged crimes" (74 F.Supp.2d at 599) but it also found that:

> "Through his representation of Hall, Saunders learned that: (a) Hall had been charged with carrying a concealed weapon at the intersection of 27th Street and Marshall in Newport News; (b) Hall's mother had pressed charges against him for assault, but she was not interested in prosecuting the case . . . ; and (c) Hall was not living with his mother at the time of his death." (74 F. Supp.2d at 606.)

March 28 was the last date on which Hall was seen alive. He was found dead on March 30. (74 F.Supp.2d at 599.) On April 3, Judge Foster of the JDRC dismissed the charges against Hall, noting by hand on Hall's record sheet (which showed conspicuously that Saunders was Hall's lawyer at the time) that defendant Hall was deceased. (74 F.Supp.2d at 599, 613-614; JA 390.) The same day, Saunders appeared at the JDRC for a hearing on the charges against Hall and was informed that Hall was dead and the charges dismissed. (74 F. Supp.2d at 599-606.) On April 4, Mickens was arrested; on April 6, Judge Foster appointed Saunders to represent Mickens in the killing of Hall. (74 F.Supp.2d at 606.) "Judge Foster did not inquire into whether Saunders

would have a conflict in representing Mickens" (240 F.3d at 354; see 74 F.Supp.2d at 613-614), and Saunders accepted the appointment without ever disclosing to anyone else—to Mickens, the criminal trial judge,[18] or Saunders' court-appointed assistant counsel—that Saunders was representing Hall on criminal delinquency charges at the time of Hall's death (74 F.Supp.2d at 600, 606, 612 & n.20).

In the light of these undisputed facts, federal habeas counsel argued to the district court that Judge Foster had appointed Saunders to defend Mickens without inquiring into a potential conflict of interests which was known or should have been known to Judge Foster, and that Saunders was afflicted with an actual conflict of interests throughout his representation of Mickens. Counsel pointed to Saunders' consistent disregard—both before and at Mickens' guilt-phase trial and two sentencing trials—of information and defensive or mitigating strategies that would have cast Saunders' former client, Hall, in a bad light. Hall was killed in a waterside location commonly used for homosexual trysts [19] and located at the base of a precipitous embankment

---

[18] After appointing Saunders to represent Mickens, Judge Foster presided at Mickens' preliminary hearing. (JA 254.)

[19] A newspaper article recounting interviews with Hall's acquaintances after his death reported that "One thing that angered his friends was that people might think Hall was a homosexual because his body was found in a place where male homosexuals frequent." (JA 397.) (Another article with a different byline on the same page reported statements by nearby residents that the area under the abandoned construction building parking lot was frequented by vagrants, winos, street people, drug addicts, prostitutes and runaways. [JA 397.]) Saunders admitted that the article may have been among news clippings he collected for the purpose of a possible change-of-venue motion before Mickens' trial (JA 230) but said that he did not remember having read it—and implied that he did not in fact read it—at that time (JA 148-149, 202). Keeling, for his part, acknowledged that he had read the article (JA 179; 1/13/99 Transcript 62-63) and had discussed it with Saunders before Mickens' trial

which would have made it unlikely that Hall could be taken there involuntarily.[20] A consent defense to the charge of attempted forcible sodomy would have reduced the only capital murder charge against Mickens to non-capital murder (whether or not a self-defense claim was also raised to the murder charge itself). (See 74 F.Supp.2d at 606-607.) Yet Saunders did not develop any line of defense based on Hall's possible acquiescence in consensual sex with his killer (see 74 F.Supp.2d at 607); nor did Saunders investigate information suggesting that Hall may have been a homosexual prostitute.[21] Saunders did not investigate leads

---

(JA 168-169). Keeling also acknowledged that the mattress on which Hall's body was found had been determined by the police to have on it pubic hairs from several different people, indicating it had been used for sexual activity on previous occasions. (JA 171; and see JA 34.) He testified that the area of Newport News including the abandoned construction building was known for prostitution (JA 169-170) and was "mapped" by the authorities (*i.e.*, designated as an area which convicted prostitutes released on probation were forbidden to reenter) (JA 170). Saunders' testimony was that he did not know whether this was true of the immediate construction-building area (JA 224-225; see also JA 150-151), but he knew that police sting operations directed at prostitutes were taking place in a different area "five or six blocks away." (JA 215; see also JA 151.)

[20] See notes 4, 5 *supra*. Mickens had originally been charged with abducting Hall as well as with attempted forcible sodomy and murder. At the preliminary hearing, the examining judge declined to find sufficient evidence of abduction (JA 254-255), and the prosecution did not thereafter pursue an abduction theory (see 240 F.3d at 354 n.3).

[21] Testifying at the federal habeas hearing, Saunders insisted that he had no information Hall may have been a homosexual prostitute. (JA 202, 215-216, 236.) However, in his deposition he admitted "there had been some statements made by somebody that I thought was in the Commonwealth Attorney's file [reviewed by Saunders before Mickens' trial] that they believed [Hall may have been a homosexual prostitute]" (JA 149) and that "I didn't investigate that aspect at all" (*ibid.*). His explanation for not investigating was that the police "fully investigated

that Hall may have been involved with other persons having a motive to kill him: specifically, a trio of creditors who were apparently hounding Hall shortly before he died,[22] and a prostitute (who might have been male or female, according to different sources) who reportedly frightened Hall into telephoning friends for help on the night and near the scene of his death.[23] (See 74 F. Supp.2d at 610-611.) The facts that

---

that aspect, and they couldn't find anything to substantiate, when they were trying to find out who killed him." (JA 149.)

Keeling testified that before Mickens' trial, Keeling and Saunders discussed rumors of Hall's being homosexual and a prostitute and "on the street." (JA 162, 169.) The newspaper article which Keeling testified he discussed with Saunders (but Saunders testified he did not remember [see note 19 *supra*]) reported that because Hall "roamed around so much, he wasn't able to collect a Social Security check until recently when he listed a friend's house . . . as his permanent address. ¶ The checks hadn't started arriving, . . . [Hall's] friends said, but suddenly Hall had money—and excuses. ¶ Alicia Thrash said Hall would be at her house and would suddenly say he had to leave. ¶ 'He would get up for a couple of hours and come back,' she said. 'He would say he was broke, then he would come back and have money . . . .' ¶ 'I think that maybe he was hustling some guys. He just picked the wrong guy,' she said, adding that she thought he was having sex with men for money but preferred women. . . . ¶ Whenever friends teased Hall about having sex with men, he'd deny it, Alicia said. ¶ 'He was ashamed about it but desperate and needed to get by,' she said."

Six years later, a co-owner and an employee of a grocery near the scene of Hall's murder could still recall being told by customers that Hall was a male prostitute. (JA 137.) The co-owner said she heard this from several customers both before and after the murder. (*Ibid.*)

[22] See JA 427, a page of Saunders' handwritten notes on the Commonwealth Attorney's files (read into the record at JA 207), containing the entry: "Tim had been ducking three guys owed money to for about three months. They came to apartment at least once."

[23] Alicia Thrash (Hall's friend quoted in the newspaper article described in note 19 *supra*) might have been a source of information on this subject. Saunders testified at the federal habeas hearing that, before Mickens' trial, Saunders phoned Thrash and asked her about a statement

attributed to her in the Commonwealth Attorney's file, to the effect that other persons than Mickens had been observed in the area where Hall was last seen alive. (JA 252-253.) However, Saunders did *not* ask Thrash about *another statement attributed to her and set out verbatim on the same page* of Saunders' handwritten notes from the same file (JA 253):

> "'everything got real messed up cause when we went to the wake this girl named Stephanie said Timmy had called her Saturday night all scared and nervous, talking about this prostitute was harassing him, saying all this kind of stuff, that he was harassing him over something or other, & then she told him to come pick her up, & he said that he was at the end of 29th St., that's where he said by the construction office, that's where he was at, & she said he called her & told her to come pick him up like that'."

(JA 424, read into the record by Saunders at JA 205-206 and quoted by the District Court in 74 F. Supp.2d at 611.) Another obvious source of information would have been the girl named Stephanie. She is identified as an ex-girlfriend of Hall's in an entry on a different page of Saunders' handwritten notes, indicating that the Commonwealth Attorney's file contained a taped telephone conversation with one Charity Fleming who "supposedly talked to Tim on Sunday [the day *after* Hall was killed] around 6-7—wanted her or Stephanie (ex-girlfriend) to pick him up at 29th St. either on corner or at Basic [Construction] because of problems he was having with a girl he picked up on Washington Ave. a couple of days before . . . ." (JA 427, read into the record at JA 207.) Testifying at the federal habeas hearing, Saunders took the position that "it didn't make any sense" to follow up the leads about Hall's calls for help (JA 209) because Fleming's statement identified the prostitute who frightened Hall as a *woman*, and Hall had obviously not been killed by a woman. (*Ibid.*) The district court, in noting the discrepancy between the Thrash and Fleming entries with regard to the gender of the prostitute, described Fleming's statement as indicating "that Thrash's secondhand account of the events was less than reliable" (74 F. Supp.2d at 611) but did not explain by what reasoning Fleming's statement might be deemed the *more* reliable of the two, considering that (1) both statements were secondhand as to what Hall said *to Stephanie*; (2) Saunders made no attempt to talk to Thrash, Fleming *or* Stephanie about Hall's telephone calls for help (see JA 206, 207, 209, 225, 229, 252-253); (3) Fleming, unlike Thrash, *could not have been correct* about the date of the calls; and (4) Saunders' own notes following the Fleming entry say "(this could be just Bull / or could have day wrong" (JA 427). The

17-year-old Hall was not living at home,[24] had a Department of Social Services caseworker who was his legal custodian,[25] had been in foster care,[26] and had assaulted his mother in a manner leading her to file charges against him (though she may have decided later for some reason not to press them) were not used in Mickens' defense in any way, even after the trial judge who was reviewing the jury's death verdict received a post-verdict report containing the most affecting statements (*e.g.*, "'all I lived for was that boy,'") on the mother's part. (JA 220-221.)

Saunders was called as a witness at the district court hearing and testified that he never perceived any potential conflict of interests between his roles as counsel for Mickens and as counsel for Hall. (74 F.Supp.2d at 605-606; JA 197-198, 239-240, 241.) The district court credited this testimony (see, *e.g.*, 74 F.Supp.2d at 605-606, 612-613),[27] saying that

district court did not finally resolve the discrepancy between the two entries because, after reviewing all of Saunders' proffered justifications for failing to follow up the leads relating to the prostitute who frightened Hall, the district court found that "[t]hese reasons for refusing to pursue evidence which pointed to the existence of an alternative perpetrator are not defensible, especially where, as here, a client's life is on the line." (74 F. Supp.2d at 611.)

[24] The newspaper article described in note 19 *supra* reported that "Adults who often fed Hall describe him as homeless because he depended upon their generosity and never knew whether he was welcome at his mother's house." (JA 397.)

[25] Saunders' testimony at the habeas hearing seems to deny he knew Hall had a social worker. (JA 190-191, 235-236.) But the petitions filed against Hall in the JDRC proceeding in which Saunders represented Hall listed "City of Hampton, Va. DSS-Caseworker Wanda Rogers" as his "Guardian/Legal Custodian or Person in Loco Parentis." (JA 393, 395.)

[26] See JA 222, 231.

[27] Nevertheless, it is indisputable that Saunders had *some* level of awareness of the duplicity of his position, because he testified that he had made a joking comment to someone (he did not recall who): "'Since I

"the evidence shows that, regrettably, Saunders never struggled with the ethical issues" involved (74 F. Supp.2d at 605) in representing a capital murder defendant after having represented the murder victim on criminal delinquency charges at the time of the victim's death.[28] This "utter insensitivity to the ethical issues raised by the facts" (74 F. Supp.2d at 612) was attributed by the district court both to Saunders' belief that "his allegiance to Hall '[e]nded when I walked in the courtroom and they told me he was dead and

represent Hall, do you think they'll let me out of this case?' " (JA 233, 247.) His recollection of this comment evolved slowly. When interviewed by federal habeas counsel, Saunders said he had told the judge who appointed him in Mickens' case about his prior representation of Hall—"that I had talked to her about it and that there was no conflict." (JA 199-202.) Later he recalled that the conversation was not with the judge, may not even have been in court, and was the above-described "joke" (JA 233, 247) made to "somebody" (JA 233). (See JA 201-202, 232-233.) Saunders did not contact federal habeas counsel and advise him of this changed recollection "[b]ecause I don't know whether I had your phone number or not either. I'm not saying I didn't. I don't know whether I did or not." (JA 202.)

[28] The district court acknowledged that "Hall's criminal history might have had some relevance to Mickens' case if Mickens' testimony had not foreclosed any theory of self-defense." (74 F. Supp.2d at 606 n.15.) But the court believed that, because Mickens testified at trial that he did not kill Hall, "any confidential information [Saunders may have obtained] from Hall . . . was [not] relevant to Mickens' defense either on the merits or at sentencing." (74 F. Supp.2d at 606.) Of course, at the time Saunders accepted an appointment to represent Mickens, Saunders had no idea what Mickens' "testimony" might be. And even in retrospect, the "testimony" to which the district court refers as making Hall's history irrelevant *was presented at a trial at which Mickens was counseled and represented by an attorney afflicted with a conflict of interests* that foreclosed the use of information unfavorable to Hall and might therefore have led Saunders to allow Mickens to take the stand and deny guilt without adequate consultation about whether Mickens would be better advised to forgo testifying and develop theories of defense or mitigation involving consensual sodomy, assaultive behavior, sexual mockery, or other forms of discreditable activity by Hall contributing to his death.

the case was gone'" (74 F.Supp.2d at 605)[29] and to "Saunders' conclusion that he did not obtain any confidential information from Hall . . . and that '[n]othing I knew or did or had anything to do with Mr. Hall had anything to do with [Mickens'] case'" (74 F.Supp.2d at 606). The district court characterized the first of these beliefs as "remarkably wrong" (74 F.Supp.2d at 605) and, as to the second, it found "inconceivable that Saunders obtained no confidential information from Hall." (74 F.Supp.2d at 606.) But it nevertheless was persuaded that whatever confidential information Saunders may have learned from Hall was not "relevant to Mickens' defense either on the merits or at sentencing." (74 F.Supp.2d at 605.)[30]

The district court conceded that "[w]hen Saunders was appointed to represent Mickens in the capital murder of Hall, Saunders was obligated to consider the ethical problems posed by the appointment because Saunders' duty to zealously represent Mickens might be compromised by his loyalty to Hall, including his obligation to preserve Hall's secrets and confidences." (74 F.Supp.2d at 605.) The district court found as a fact that Saunders had never considered these ethical problems (74 F.Supp.2d at 605) or disclosed the fact of his prior representation of Hall to Mickens or the trial court or even to Saunders' co-counsel so that *they* could consider the problems. (74 F.Supp.2d at 600, 606, 612 & n.20.) Yet the district court concluded that Saunders' dual role in relation to Hall and Mickens neither constituted an "actual conflict of interest" (74 F.Supp.2d at 604-606) nor had an "adverse effect" on his representation of Mickens (74 F.

[29] See also 74 F. Supp.2d at 606: "Without condoning the inexcusable failure to disclose the previous representation of Hall, the Court finds that, as a factual matter, Saunders *did not believe* that any 'continuing duties to [a] former client[ ] [might] interfere with his consideration of all facts and options for his current client.'" (Emphasis added.)

[30] See note 28 *supra*.

Supp.2d at 606-613). These conclusions were derived from an analysis that accepted as a *given* the record made by Saunders at Mickens' trial, including Mickens' testimonial disavowal of any connection with Hall's death. Such a disavowal, the district judge believed, made irrelevant the ethical constraints that restricted Saunders' ability to develop and present evidence disparaging to Hall.[31] Mickens' federal habeas petition was accordingly denied.

A divided three-judge panel of the Fourth Circuit reversed this decision on the grounds that Mickens

> "has shown that (1) the state judge failed to inquire into an apparent conflict that she knew or reasonably should have known existed, (2) he did not waive any conflict, and (3) his lawyer, Saunders, had an actual conflict of interest. This is sufficient under *Wood v. Georgia* [450 U.S. 261 (1981)] to establish the merits of his claim."

(227 F.3d at 217.) The panel majority identified at least three distinct aspects of Saunders' situation which amounted to an actual conflict:

> (1) "Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing . . . a reasonable pretrial investigation." (227 F.3d at 216.) "Saunders did not investigate (or attempt to develop) any negative information about Hall, the victim of the crime Mickens allegedly committed. Yet the circumstances of this crime (murder and sodomy) suggested that some consideration had to be given to investigating the character and background of the victim." (*Ibid.*) "Saunders had an actual conflict because he could not even consider an investigation into Hall's character or background, using as a starting point the information he had about the circumstances of the crimes charged against Hall." (*Id.* at 217.)

[31] See note 28 *supra*.

> (2) "Because this was a capital case, there was a good chance that someone from the victim's family (perhaps Hall's mother) would testify during the penalty phase. . . . Surely this would require defense counsel to consider investigating the victim's relationship with key family members, especially (in this case) the victim's mother since the victim was a juvenile. . . . Saunders' interest in preserving Hall's confidences diverged from Mickens' interest in having Saunders consider an investigation into Hall's relationship with his mother." (*Ibid.*)
>
> (3) "[T]he Virginia Code of Professional Responsibility . . . provided that a lawyer had the duty to 'explain any circumstances that might cause a client to question his undivided loyalty.' . . . As the district court found, 'Saunders' representation of the murder victim, at the time of the murder, is undoubtedly a circumstance "that might cause a client to question his undivided loyal."' . . . Saunders thus had the duty to inform both Mickens and the court of the prior representation of Hall. If Mickens had objected, Saunders had a related duty to withdraw. ¶ Once Saunders proceeded with the representation of Mickens in these circumstances, he was potentially subject to disciplinary proceedings. . . . Saunders had an interest in preventing his representation of Hall from coming to light. This interest diverged from Mickens' interest in learning about the earlier representation and in making sure he . . . received conflict-free representation." (*Id.* at 214-215.)

A dissenting opinion argued that, while "the decision in *Wood* . . . has not turned out to be a model of clarity" (227 F.3d at 220), *Wood* is best read as requiring a showing of *both* an actual conflict of interests *and* a resulting adverse effect on counsel's performance; and that Mickens had not shown the requisite adverse effect. (227 F.3d at 218-224.)

The Commonwealth's petition for rehearing *en banc* was granted and the Fourth Circuit essentially adopted the position of the panel dissent in rejecting Mickens' Sixth Amendment claim by a vote of seven to three. After acknowledging that the claim was properly before the *en banc* court on the merits,[32] the majority made two assumptions which framed its analysis of the Sixth Amendment issues presented. It "accept[ed] for purposes of discussion, without deciding the issue, that Judge Foster, who appointed Saunders to represent Mickens, reasonably should have known that Saunders labored under a potential conflict of interest arising from his previous representation of Hall." (240 F.3d at 357.) And it assumed *arguendo*, again without need to "reach [Mickens'] . . . argument [on the point decided in his favor by the panel] that he has established an actual conflict of interest." (240 F.3d at 360.)

In this state of the case, the *en banc* majority saw the doctrinal issue presented as involving the appropriate interpretation of *Wood v. Georgia* in the light of the earlier opinion in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which was quoted and paraphrased three years after *Wood* in *Strickland v. Washington*, 466 U.S. 668 (1984):

> "Mickens notes that the *Wood* Court remanded to the trial court [which had failed to inquire into a potential conflict of interests of counsel apparent on the record] 'to determine whether the conflict of interest that this record strongly suggests actually existed' with an instruction to award a new hearing if 'an actual conflict

[32] The *en banc* court agreed with the panel majority and with the district court that Mickens' failure to raise the claim in state court did not bar federal habeas adjudication on the merits under the doctrines of exhaustion or procedural default because the basis for the claim was first discovered by Mickens' federal habeas counsel and could not have been discovered earlier by lawyers for Mickens other than Saunders himself. (240 F.3d at 356-357.)

> existed . . .' but did not expressly require the trial court to identify an adverse effect. . . . Mickens concludes from this remand instruction that the *Wood* court eliminated the adverse effect requirement [laid down by *Sullivan*—a case in which the potential conflict of interests was *not* apparent on the record] in cases where the trial court failed to inquire into a conflict of interest about which it reasonably should have known."

(240 F.3d at 359.) The *en banc* court rejected this conclusion and held that "*Wood* does not relieve a petitioner [who is "challenging his conviction on conflict of interest grounds"] of [the] . . . burden [imposed by *Sullivan* to "establish that his attorney's conflict of interest adversely affected his performance"], even when the trial court has failed to inquire into a potential conflict about which it reasonably should have been aware." (240 F.3d at 363.)

Elaborating the adverse-effect requirement, the *en banc* majority endorsed a "three-part standard." (240 F.3d at 361.) In addition to "identify[ing] a plausible alternative defense strategy that his [conflict-ridden] . . . counsel might have pursued" and showing that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time," a Sixth Amendment claimant must also show that "defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." (*Ibid.*) The requisite "link" was held missing whenever the district court found as a matter of subjective fact that Saunders' reasons for various failures were "unrelated" to Saunders' conflict of interests[33] or where Saunders' course of action

[33] See, *e.g.*, 240 F.3d at 362: "The district court . . . concluded that Saunders' failure to investigate into matters identified by Mickens was either harmless or unrelated to Saunders' conflict of interest. . . . In particular, the district court attributed Saunders' failure to inquire into leads as to possible alternative perpetrators of the murder to the weak nature of the leads, rather than to Saunders' conflict of interest. . . ."

was one that a competent, unconflicted lawyer might have chosen.[34] [35] "Because . . . [it] agree[d] with the district court that many of Mickens' assertions of adverse effect were not viable defense strategies[36] and that any viable defense

[34] See, *e.g.*, 240 F.3d at 361: "Because Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time Saunders made his decision not to pursue it. See *Royal v. Taylor*, 188 F.3d 239, 248-49 (4th Cir. 1999) [a case *not* involving any conflict of interests but dealing with what counsel is "entitled to" do in the context of a claim that *un*conflicted counsel was ineffective]; *Roach v. Martin*, 757 F.2d 1463, 1476-80 (4th Cir. 1985) [a case involving wholly independent claims of conflict of interests and ineffective assistance under *Strickland* in which the passages about counsel's being entitled to rely on a client's statements are found solely in the portion of the opinion discussing the *Strickland* claim]." See also *id.* at 362: "Choosing not to vilify the mother of the victim cannot be *the mark of incompetent counsel* by any measure" (emphasis added).

[35] We use the disjunctive "or" because it is plain that the *en banc* majority held the requisite "link" unestablished even when Saunders' failings were below the standard of professionally competent behavior, so long as they were not subjectively motivated by his perception of conflicting obligations to Mickens and Hall. For example, as quoted in note 33 *supra*, the *en banc* majority approved the district court's conclusions "that Saunders' failure to investigate into [various] matters . . . was either harmless or unrelated to Saunders' conflict of interest." In connection with one of those investigative failures, the district court wrote: "The lead should have been pursued because . . . [it] suggested that there might have been evidence of an alternative perpetrator. The record discloses no reason for the failure to follow that lead *other than Saunders' lack of perspicacity or perhaps indolence*. Neither of these reasons bespeaks that he failed to act because of his previous representation of Hall." (74 F. Supp.2d at 610 [emphasis added].)

[36] Like the district court (see note 28 *supra*), the *en banc* Court of Appeals majority evaluated the "viability" of alternative strategies against the record *as it was made by conflicted counsel himself* and without regard to what sort of record might have been made by conflict-free counsel for Mickens. See, *e.g.*, 240 F.3d at 361 : "[P]resentation of . . . evidence [obtained by following up rumors that Hall was a male prostitute] would have been counter-productive and would have been inconsistent with Mickens' assertions of sympathy for the victim and his family. Mickens

strategies were not linked to his attorney's conflict of interest, . . . [the *en banc* majority] reject[ed] Mickens' Sixth Amendment challenge to his conviction" (420 F.3d at 362) and denied habeas corpus relief.

SUMMARY OF ARGUMENT

I.A This Court's precedents lay down an unambiguous rule to govern cases in which a judge is on notice of a potential conflict of interests on the part of a criminal defendant's lawyer before trial but fails to inquire into it. If the defendant is convicted before learning about the situation, he or she is entitled to postconviction relief upon a showing that the lawyer did in fact harbor an actual conflict of interests. No showing of "adverse effect" is required.

The rationale for this rule was established by *Holloway v. Arkansas*. The rule itself was explicitly acknowledged in *Cuyler v. Sullivan*. The rule was reiterated as the *ratio decidendi* for the Court's square holding in *Wood v. Georgia*. The rule is settled and it is clear. It is obedient to basic Sixth Amendment principles and it is efficient. There is no reason to depart from it. The Court should apply it here.

I.B Mickens' lawyer, Bryan Saunders, harbored an acute, actual conflict of interests in purporting to represent Mickens. Mickens was accused of the capital murder of Timothy Hall.

v. Greene, 74 F. Supp.2d at 608." The cited passage from the district court opinion (at 608) reads: "Of course, adoption of that alternative strategy [of investigating negative information about Hall] would have been inconsistent with Mickens' profession of innocence and his purported regret at Hall's passing. 'I'll pray each and every day that [Hall] may rest in peace.' (6/4/93 Hr. T. at 1090 (sentencing hearing)). Saunders carried that standard during his closing argument, emphasizing the sanctity of human life and expressing regret for Hall's death. (2/7/96 Hr. T. at 479-80; 1/13/99 Hr. T. at 157.) Saunders eschewed an attack on Hall, the young victim of a horrible crime, because it would have appeared disingenuous and would have diminished the value of Mickens' life in the eyes of the jury."

At the time of Hall's death, Hall was represented on criminal delinquency charges by Bryan Saunders. In the course of representing Hall, Saunders obtained contemporary, confidential information concerning Hall's background and circumstances that any unconflicted lawyer for Mickens would have investigated for its bearing on issues of guilt and penalty in Mickens' case. An unconflicted lawyer would have made the decisions how and how much to pursue and use this information based solely upon Mickens' interest in defending a prosecution for his life. Saunders, with his obligations to his former client, Hall, was ethically forbidden to make these investigative and strategic decisions solely in Mickens' interest. That was and is an actual conflict.

II. Even if *Wood* countenanced an inquiry into "adverse effect" under these circumstances, the Fourth Circuit *en banc* majority misconceived and misapplied the adverse-effect concept. A showing of adverse effect needs not depend upon a subjective inquiry into the conflict-ridden lawyer's reasons for refraining from actions that would be in his client's interest. Still less does it require that the lawyer's conduct of the client's case be such that no unconflicted, competent lawyer would have chosen to proceed in the same manner.

The touchstone of "adverse effect" is impairment of the adequacy of a client's legal representation due to a conflict of interests. Representation includes the responsibility to make choices about how to proceed based upon undivided loyalty to one's client. Saunders was prohibited from making such choices based solely upon Mickens' interest. That prohibition critically impaired the adequacy of Mickens' representation.

ARGUMENT

I. *WOOD V. GEORGIA* GOVERNS THIS CASE AND REQUIRES POSTCONVICTION RELIEF BECAUSE OF DEFENSE COUNSEL'S ACTUAL CONFLICT OF INTERESTS, WHETHER OR NOT THE CONFLICT IS SHOWN TO HAVE HAD ANY "ADVERSE EFFECT"

Although the facts of this case are complicated and bizarre, the basic Sixth Amendment issue is simple: When a judge appointing counsel for a criminal defendant should be aware of a potential conflict of interests burdening the lawyer s/he selects, and when s/he nonetheless fails to inquire whether the conflict is an actual one and is acceptable to the defendant (if waivable), must the defendant who learns and proves after conviction that the lawyer **did** have an actual conflict of interests ***also*** show some specific "adverse effect" of the conflict in order to obtain postconviction relief?

The *en banc* majority below was wrong in concluding that this Court's cases speak incoherently or inconsistently to that issue. The explicit holding of *Wood v. Georgia*, 450 U.S. 261 (1981), is that a defendant in this posture is entitled to a new trial upon the showing of an actual conflict of interests without more. Far from being at odds with any other precedent, the ruling in *Wood* aligns with all of the conflict-of-interest decisions and right-to-counsel pronouncements of this Court to form a harmonious whole. The whole set of rules is sensible, practical, and responsive to core Sixth Amendment values. Under those rules, Mickens is entitled to a new trial with conflict-free counsel to defend him.

A. Under *Wood*, an actual conflict of interests that inheres in counsel's duplicitous posture deprives a criminal defendant of the assistance of counsel and voids the defendant's conviction with no need to show "adverse effect"

A defendant's right to counsel is fundamental to the adversary system of criminal justice. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." (*Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938).)

To assure just results and command public confidence in the adversary process "now considered fundamental to the fair administration of American justice," [37] a criminal defendant must have "the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932)—in conducting the investigation necessary for a fair trial,[38] in attempting to persuade the prosecutor to resolve the prosecution without trial,[39] in subjecting the prosecution's case to "the crucible of meaningful adversarial testing," [40] in determining whether the defendant should take the stand in his or her own defense,[41] in preparing and

[37] *Faretta v. California*, 422 U.S. 806, 818 (1975).

[38] *Kimmelman v. Morrison*, 477 U.S. 365, 384-385 (1986).

[39] *Holloway v. Arkansas*, 435 U.S. 475, 490-491 (1978).

[40] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

[41] *Brooks v. Tennessee*, 406 U.S. 605, 612-613 (1972).

presenting the defendant's testimony if s/he does,[42] in evaluating and presenting other defensive evidence,[43] and in arguing to the trier of fact that the prosecution's case is not all that it appears to be or that there is another side to the case warranting a reasonable doubt.[44] These are the indispensable components of effective advocacy, and "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

The Court first considered the constitutional implications of a conflict of interests on the part of defense counsel in *Glasser v. United States*, 315 U.S. 60 (1942). *Glasser* held that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests." (*Id.* at 70.) Finding that Glasser's lawyer had a conflict of interests, "the Court declined to inquire whether the prejudice flowing from it was harmless and instead ordered Glasser's conviction reversed." [45]

The Court revisited the subject of a conflict-ridden defendant's lawyer in *Holloway v. Arkansas*, 435 U.S. 475 (1978). The rule of *Holloway* is that when appointed counsel has advised the appointing court "of the probable risk of a conflict of interests," and when "the judge [has] then failed either to appoint [other] . . . counsel or to take adequate steps to ascertain whether the risk was too remote to warrant [other] . . . counsel," this failure "deprive[s the defendant] . . .

[42] *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Geders v. United States*, 425 U.S. 80 (1976).

[43] *[Terry] Williams v. Taylor*, 529 U.S. 362 (2000).

[44] *Herring v. New York*, 422 U.S. 853 (1975).

[45] *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). See 315 U.S. at 75-76.

of the guarantee of 'assistance of counsel' " (*id.* at 484), and entitles the defendant to a new trial with no need "to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion" (*id.* at 490).

It is plain from *Holloway*, though the *en banc* majority below failed to see it, that the significance of the objections made by Holloway's lawyer to representing multiple defendants was not primarily that they placed the defendants' protests on the record, but that they **called the existence of a conflict of interests to the attention of the court**. *Holloway* quotes *Glasser* as holding that " '[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused' " and to refrain from putting counsel in the position of representing interests which might diverge from a client's " '*when the possibility of that divergence is brought home to the court.*' " (435 U.S. at 484-485.) Then *Holloway* says that "[t]his reasoning [from *Glasser*] has direct applicability in [the *Holloway*] . . . case where the 'possibility of . . . inconsistent interests' was 'brought home to the court' by formal objections, motions, and defense counsel's representations." (435 U.S. at 485.) Manifestly, it was the "bringing home to the court," not the mechanism through which it occurred, that was decisive in *Holloway*. (See *Wheat v. United States*, 486 U.S. 153, 160, 161 (1988), reading *Holloway* this way.)

The Court's next treatment of the subject came in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The question in *Sullivan* was whether a trial judge is obligated to inquire *sua sponte* into the existence of a conflict of interests whenever a single lawyer appears on behalf of two or more criminal defendants in a multi-defendant prosecution. *Sullivan*'s unsurprising answer was, no. In an opinion by Justice Powell, the Court acknowledged that a potential for conflict exists in all joint-representation cases (*id.* at 348), but it recognized that there may be no actual conflict in many of the cases and that

sometimes multiple representation best serves the interests of all defendants because " ' "[a] common defense . . . gives strength against a common attack" ' " (*ibid.*). The Court's reasoning was once again quite clear, and it was consistent with *Holloway* on every point, including the question of what is constitutionally required to trigger a judicial obligation to inquire into a potential conflict of interests:

> "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises in the course of a trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in *Holloway* . . . , trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. . . . **Unless the trial court knows or reasonably should know that a particular conflict exists**, the court need not initiate an inquiry." (446 U.S. at 346-347 [emphasis added].)

The *Sullivan* Court went on to hold that *where no judicial duty to initiate an inquiry arises*, a defendant challenging his or her conviction on Sixth Amendment conflict-of-interest grounds must show both an "actual conflict of interest" (*id.* at 348, 349-350) and that this conflict "adversely affected his lawyer's performance" (*id.* at 348).

Less than a year after *Sullivan*, the Court handed down its decision in *Wood v. Georgia*, 450 U.S. 261 (1981), also written by Justice Powell. The premise of *Wood* was that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (*Id.* at 271.) Finding that the *Wood* record showed "that the *possibility* of a conflict of interest was sufficiently apparent at the time of the [criminal proceeding] . . . to impose upon the court a duty to inquire further" (*id.* at 272), the Court

remanded for such an inquiry. It reiterated *Sullivan*'s Unless clause in mandatory form ("*Sullivan mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists' " [*id.* at 272 n.18]) and instructed the trial court on remand to "hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed . . . ." (450 U.S. at 273.) The dispositional paragraph in *Wood* could not be clearer regarding either the issue to be determined at the hearing or the consequences of its resolution: "If the court finds that an actual conflict existed . . . and that there was no valid waiver of the right to independent counsel, it must hold a new . . . [trial] that is untainted by a legal representative serving conflicting interests." (*Id.* at 273-274.)

Thus, in *Sullivan* in 1980 the Court explicitly laid down a two-part inquiry to be undertaken in cases where a potential conflict of interests exists but the judge neither knows nor has reason to know about it. Describing the rule of *Sullivan* in 1984, the Court in *Strickland v. Washington*, 466 U.S. 668, again explicitly articulated the same two-part inquiry, writing that a defendant seeking Sixth Amendment relief under *Sullivan* must demonstrate "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " (466 U.S. at 692 [quoting *Sullivan*, 446 U.S. at 348]). And in 1981, in between this pair of two-part pronouncements, the Court in *Wood*—when delineating the findings that would call for a new trial in one of the "special circumstances" contemplated by *Sullivan* (446 U.S. at 346-347), namely, where "the trial court knows or should reasonably know that a particular conflict exists" but fails to inquire into it (446 U.S. at 347)—wrote equally explicitly that under these circumstances only **one** determination needed to be made in order to compel a new trial: "that an actual conflict existed" (450 U.S. at 273).

In the light of this series of decisions, it will hardly do to dismiss *Wood*'s single-issue remand instruction to the trial court as "amount[ing] to no more than shorthand for an explicit two-part test that the *Wood* Court did not even have the occasion to quote [from *Sullivan*]" (240 F.3d at 360). In the first place, what the *Wood* Court *did* quote from *Sullivan* was *Sullivan*'s express language anticipating and distinguishing the factual situation presented in *Wood*. This language says in no uncertain terms that there are two different rules for two different situations—the *Wood* situation where a judge " 'knows or reasonably should know that a particular conflict exists' " (*Sullivan*, 446 U.S. at 347, quoted in *Wood*, 450 U.S. at 272 n.18), and the *Sullivan* situation where the judge does not. But if *Wood*'s holding that a showing of "actual conflict" suffices to obtain a new trial is conflated with *Sullivan*'s actual-conflict-*plus*-adverse-effect requirement, then there are **not** two different rules; and *Sullivan* as well as *Wood* is rendered gibberish.

In the second place, the *Sullivan* and *Wood* opinions, containing manifestly different formulations of what must be shown to obtain a new trial, were both written by Justice Powell, a studiously careful and precise author. The passage of his *Wood* opinion which the Fourth Circuit parsed as "shorthand" is *the dispositional paragraph*, setting out what the trial court was to do on remand. That is a peculiarly unlikely place for a careful jurist to write inexactly.

And in the third place, the suggestion by the *en banc* Fourth Circuit that the explicit language of *Wood* should be disregarded so that *Wood* will not "have overruled by implication the second part of Sullivan's two-part standard" (240 F.3d at 359) is untenable. *Wood* **followed** *Sullivan*, rather than "overruling" it, in distinguishing cases where a judge "'knows or reasonably should know that a particular conflict exists'" and those where s/he does not. To obliterate that distinction is to disrespect *Sullivan* **and** overrule *Wood*.

Stare decisis should not be abandoned so cavalierly. *Dickerson v. United States*, 530 U.S. 428 (2000). There is no "'"special justification"' " (*id.* at 443) for departing from *Wood*. To the contrary, there is every reason to adhere to *Wood*'s square holding.

One. *Wood*, *Sullivan*, *Holloway* and the description of these cases in *Strickland* form a coherent body of Sixth Amendment doctrine. As the Fourth Circuit dissenters correctly observed, the cases lay down rules for

> "three separate circumstances in which conflict of interest claims arise under the Sixth Amendment. The first is when a defendant objects to his representation on the basis of a conflict and the trial judge fails to inquire into the merits of the objection. In this situation, the defendant is entitled to automatic reversal and a new trial. *See Holloway*, 435 U.S. at 488-89 . . . . The second circumstance is when there is no objection to the representation, but the judge knew or reasonably should have known about an apparent conflict. If the judge fails to inquire in this situation, the defendant is only required to show that his lawyer labored under an actual conflict. *See Wood*, 450 U.S. at 273-74 . . . . The third circumstance is when there is no objection, and the conflict is not apparent to the judge. In that case, the defendant must show that his lawyer labored under an actual conflict and that the conflict adversely affected his lawyer's performance. *See Sullivan*, 446 U.S. at 348 . . . ." (240 F.3d at 366.)

This set of rules makes perfect logical sense. With respect to (A) requiring a judicial inquiry into potential conflicts that should be apparent to a reasonable judge, and (B) granting the defendant a new trial upon a showing of actual conflict if the inquiry is not made, they prescribe the same rule in *Holloway* situations (where the problem is called to the court's attention by a defense objection) and in *Wood* situations (where the

problem is called to the court's attention by other circumstances of record). Each of these results is apt, because there is no conceivable reason to treat the *Holloway* and *Wood* situations differently for purposes of issues (A) or (B). In both situations, the judge is on notice of a significant risk that the defendant may be denied the "assistance of counsel" required by the Sixth Amendment; and in both situations the judge is equally well positioned to dispel that risk by a simple inquiry and straightforward follow-up.

The failure of an apparently conflicted lawyer to protest the conflict in the *Wood* situation does not lessen the need for judicial inquiry; nor does it supply any justification for requiring a *post hoc* showing of some specific adverse effect if the inquiry is not made and an actual conflict emerges. As *Sullivan* noted, defense attorneys are ethically obliged to bring potential, unwaived conflicts to the attention of the court. (446 U.S. at 346.) When they do so, a trial judge can and should be expected to "rely . . . upon the good faith and good judgment of defense counsel" because counsel " ' "is in the best position . . . to determine when a conflict of interest exists or will probably develop . . . ." ' " (*Sullivan*, 446 U.S. at 347, quoting *Holloway*, 435 U.S. at 485, quoting *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973).) This is why a *potential* conflict suffices to secure postconviction relief in *Holloway* situations (where a judge has failed to act in response to defense counsel's representation that, in his or her professional judgment, s/he is burdened by a conflict of interests),[46] while a showing of an *actual* conflict is required

---

[46] "[S]ince the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. . . . [A]ttorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' " . . . We find these considerations persuasive." (*Holloway*, 435 U.S. at 485-486.)

in *Wood* situations (where counsel makes no such representation). But if an apparently conflicted lawyer—a lawyer about whom the "court knows or should know that a particular conflict exists" (*Sullivan*, 446 U.S. at 347)—does **not** broach the subject of that conflict to the court, the court can **not** safely rely on counsel's good faith and good judgment. After all, the danger of conflicting interests is precisely that a lawyer with a conflict may be faithless.[47] This danger is in no way dispelled through silence on the subject by a lawyer whom the court has reason to believe is harboring—and concealing—a conflict.

Two. The *Wood-Sullivan-Holloway* rules also make eminent practical sense. They do not compel a judicial inquiry every time an attorney appears on behalf of two jointly-charged defendants. As a corollary—to avoid jeopardizing the results of all trials involving multi-defendant representation—they require defendants who make post-conviction conflict-of-interest claims in this situation to show both an actual conflict and an adverse effect of the conflict.

But the rules do compel a judicial inquiry when facts known to the judge put the court on notice that a particular conflict exists. This inquiry serves to nip the problem in the bud and to avert not only the risk that a faithless lawyer may expose the defendant to an unfair trial, but also the heavy costs and hazards of postconviction litigation attempting to reconstruct after-the-fact the extent to which the conflict affected the lawyer's performance. The costs are obvious.

---

[47] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Chapter 8, Introductory Note (American Law Institute 2000) ("The prohibition against conflicts of interest reflects the role of a lawyer as the loyal representative of a client's interest. . . . Lawyers are required to avoid divided loyalties that would harm their principals, their clients."); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586 (1990) (Justice Kennedy, dissenting) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests.")

Everybody in two court systems would have been spared enormous wastes of time and effort if Judge Foster had simply said to attorney Saunders in 1992: "Before I appoint you to represent Mr. Mickens on capital murder charges, let's explore the possible conflict of interests resulting from your representation of the murder victim until 3 days ago."

As for the *hazards* of postconviction litigation, the present record bears out this Court's observation in *Holloway* that *post hoc* assessment of "the impact of a conflict on the attorney's representation of a client" comes down to "unguided speculation" (435 U.S. at 491). It also bears out the observation of two courts of appeals that the quest for *post hoc* truth in such assessments is likely to prove a futile effort to pin down a scared, self-protective, slippery lawyer, anxious to escape ethical censure at whatever cost to a former client.[48] In this case, the district judge credited some aspects of attorney Saunders' testimony,[49] found other aspects incredible,[50] left unresolved irreconcilable conflicts between

---

[48] *United States v. Malpiedi*, 62 F.3d 465, 470 (2d Cir.1995): "[A]fter-the-fact testimony by a lawyer who was precluded by a conflict of interest from pursuing a strategy or tactic is not helpful. Even the most candid persons may be able to convince themselves that they actually would not have used that strategy or tactic anyway, when the alternative is a confession of ineffective assistance resulting from ethical limitations." *Accord*: *Perillo v. Johnson*, 205 F.3d 775, 807 (5th Cir. 2000).

[49] See 74 F. Supp.2d at 605-606, 612-613, discussed in text at note 27 *supra*.

[50] See Saunders' testimony at page 219 of the transcript of the federal district court hearing held 1/13/99:

"BY MR. HARRIS:

"Q. . . . [D]id you receive any confidential communications from Timothy Hall in the course of your representation of Timothy Hall?

"A. Not really, no." (JA 237.)

Saunders' testimony and that of co-counsel Keeling,[51] and did not say what he thought of behavior on Saunders' part calculated to turn the postconviction proceedings into a game of Blind Man's Buff with federal habeas counsel.[52] Any doubts about the wisdom of the *Wood-Holloway* rule eschewing *post hoc* inquiries into adverse effect once a lawyer has been shown to have tried a case through to conviction while laboring under an actual conflict of interests can be settled, we respectfully submit, simply by reading the transcript of the federal habeas hearing below from start to finish. Insofar as it attempted to untangle Bryan Saunders' motives or make sense of his performance in conducting Walter Mickens' case, that hearing is a model of the kind of litigation that constitutional rules should be shaped to avoid.

Three. The *Wood-Holloway* rule eschewing *post hoc* inquiry into "adverse effect" conforms to this Court's understanding of the evil that drives the substantive Sixth Amendment proscription of conflict-ridden counsel. "[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing." (*Holloway*, 435 U.S. at 490; *accord*: *United States v. Cronic*, 466 U.S. at 661 n.28.) A record made by a lawyer who harbors a conflict of interests is likely to be an *impoverished* record, and the extent of the impoverishment is undetectable. To use such a record as the basis for calculating adverse effect is like trying to measure the depletion in a cracked radiator tank by pouring quarts of coolant into it and keeping careful count.

Finally, the *Wood-Holloway* rule is squarely in the grain of this Court's general Sixth Amendment jurisprudence. Since

---

Compare the court's finding: "it is inconceivable that Saunders obtained no confidential information from Hall, ([citing] 1/13/99 Hr. Tr. at 219)." (74 F. Supp.2d at 606.)

[51] See, *e.g.*, notes 6, 19, 21 *supra*.

[52] See note 27 *supra*.

Powell v. Alabama first spoke of the "guiding hand of counsel," the Court has reiterated time and again that what is needed and expected from a lawyer for the defense is the exercise of *trained professional judgment* to assist the accused in navigating the shoals of the criminal process.[53] Unless that judgment is exercised with undivided loyalty to the defendant, it cannot be counted on to provide the "assistance of counsel" that the Constitution guarantees.[54] Therefore, when a defendant—at the first opportunity after learning there is cause to doubt the undivided loyalty of defense counsel—proves that counsel harbored an **actual conflict of interests** involving obligations or loyalties which are inherently at odds with some plausible course of action not pursued on the client's behalf, it is neither necessary nor proper to engage in computations of adverse effect. A failure of the judicial process has left this defendant at the mercy of a lawyer who could not be trusted;[55] and that should be sufficient to call for a new trial.

---

[53] See, *e.g.*, *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); *Geders v. United States*, 425 U.S. 80, 88-89 (1976).

[54] See, *e.g.*, AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-14 (1983) ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.7:101 (2d ed. 1998) ("The basic duties that a lawyer owes to a client—competence, confidentiality, communication, and loyalty—are all implicated in conflict of interest situations.")

[55] CHARLES WOLFRAM, MODERN LEGAL ETHICS § 7.1 at 316-317 (1986) ("The principle of loyalty of lawyer to client is a basic tenet of the Anglo-American conception of the lawyer-client relationship. . . . Where choices have to be made between the interest of a client and any other person—whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those

"This is not a test that requires a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable, that the lapse in representation affected the outcome of the trial, or even that, but for the conflict, counsel's conduct of the trial would have been different. Rather, it is enough to show that a conflict existed that 'was inherently in conflict with' a plausible line of defense or attack on the prosecution's case. . . .

"The test is a strict one because a defendant has a right to an attorney who can make strategic and tactical choices free from any conflict of interest. An attorney who is prevented from pursuing a strategy or tactic because of the canons of ethics is hardly an objective judge of whether that strategy or tactic is sound trial practice. Counsel's inability to make such a conflict-free decision is itself a lapse in representation." *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir.1995).

This is the substance of *Wood*'s wisdom; and the Court should not now abandon it.

B. Mickens' appointed counsel harbored a severe, actual conflict of interests

The same considerations that make an inquiry into "adverse effect" improvident in *Wood* situations call for an objective test of "actual conflict." A client who has been deprived of an attorney capable of serving with unalloyed fidelity does not have to show the subjective reasons for the

---

of the client."); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.7 (1999) ("Loyalty is an essential element in the lawyer's relationship to a client."); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 117 (1854) ("[T]he great duty which the counsel owes to his client, is an immovable fidelity.")

conflict-ridden lawyer's failures to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." [56] To demonstrate an actual conflict it is enough to establish that the lawyer "actively represented conflicting interests" (*Sullivan*, 446 U.S. at 350) in the sense of having duties or commitments inconsistent with a course of action that the lawyer might have taken in the client's interest but did not. This is implicit in *Sullivan*'s equation of "an actual conflict of interest" with "an actual lapse in representation" (*id.* at 349).

Circuit cases following *Sullivan* have uniformly recognized that such a lapse may be shown objectively, by pointing to "some plausible alternative defense strategy or tactic [that] might have been pursued [but was not, and] . . . was inherently in conflict with . . . the attorney's other loyalties or interests." [57] Using this approach, the Fourth Circuit panel

---

[56] AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.3 (1999). See also AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-1 (1983): "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."

[57] *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir. 1985). The full passage from *Fahey* reads: "In order to establish an actual conflict the petitioner must show two elements. First, he must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."

Fahey's formulation is the one most widely used in the Circuits (see, *e.g.*, *United States v. Soldevila-Lopez*, 17 F.3d 480, 486 (1st Cir. 1994); *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993); *Lopez v. Scully*, 58 F.3d 38, 41 (2d Cir. 1995); *United States v. Morelli*, 169 F.3d 798, 810 (3d Cir. 1999); *Hess v. Mazurkiewicz*, 135 F.3d 905, 910 (3d Cir. 1998); *cf. United States v. Bowie*, 892 F.2d 1494, 1500 (10th Cir. 1990) [a "seemingly valid or genuine alternative strategy or tactic was available

below identified three distinct ways in which Saunders' duties and interests flowing from his representation of Timothy Hall at the time of Hall's death were inherently in conflict with potentially productive actions that Saunders might have taken in defending Mickens but did not take. (See pages 16-17 above.) The *en banc* majority accepted the panel's conclusion on this issue *arguendo*, and for good reason. The panel's finding that Saunders labored under a severe actual conflict of interests was indisputably correct.

We submit the panel's analysis of this issue as definitive. See 227 F.2d at 213-217, JA 332-341. The following pages only emphasize a few of its less salient points:

At the very time when Timothy Hall was killed—a time at which Hall's behavior vis-à-vis his killer was decisive of the question whether the killing was capital murder [58]—Bryan Saunders represented Hall on pending charges of criminal delinquency. Within the preceding few days, Saunders had

---

to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests"]) but there are other objective tests as well (see, *e.g.*, *United States v. Migliaccio*, 34 F.3d 1517, 1526 (10th Cir. 1994); *Church v. Sullivan*, 942 F.2d 1501, 1512 (10th Cir. 1991); *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994); *Lipson v. United States*, 233 F.3d 942, 946 (7th Cir. 200); *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir. 1992); *Mannhalt v. Reed*, 847 F.2d 576, 581-583 (9th Cir. 1988)). Most of these opinions also recognize that when an "adverse effect" must be shown under *Sullivan*, this too can be established objectively, without proving a *motivational* link between counsel's conflicting interests and failure to pursue a course of conduct potentially beneficial to the client. On the latter point, the Fourth Circuit decision below and *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (*en banc*), depart from the majority view. But *Freund* does not treat counsel's motivation as controlling on the actual-conflict issue (as distinguished from the adverse-effect issue) (see 165 F.3d at 858-860, 862-866); and the Fourth Circuit *en banc* majority ruled against Mr. Mickens solely on the adverse-effect issue, assuming *arguendo* that he had established an actual conflict of interests (240 F.3d at 356, 360).

[58] See text and notes at notes 1-2 *supra*.

met with Hall to interview him about these charges. As the district court found, it is inconceivable that Saunders obtained no confidential information in these interviews.[59] He also obtained confidential information from the petitions and probable-cause statements filed against Hall in the JDRC—records that were confidential under Virginia law and available to Saunders only in his capacity as Hall's lawyer.[60]

We cannot, of course, know all of the facts that Saunders learned through his representation of Hall, since these were and still are shielded by attorney-client confidentiality.[61] But we do know from inescapable inference that Saunders learned at least the following information, which he was thus barred from using in any way in his defense of Walter Mickens: Hall was living away from home, was in the legal custody of the Department of Social Services, and had a case worker assigned to him even before the events giving rise to the first of the current charges against him—assault and battery against his mother.[62] Saunders also knew (although the information remains closed to us) *why* Hall was in DSS custody.[63] Any competent lawyer representing Walter Mickens on a charge of capital murder for the killing of Hall who had obtained this kind of information by an independent

---

[59] See note 50 *supra*, quoting 74 F. Supp.2d at 606.

[60] See note 17 *supra*.

[61] *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

[62] See text and notes at notes 24-26 *supra*.

[63] See JA 234:

"MR. HARRIS: . . .

"Q. Did you ask, and I'll add the same caveat as the Judge did, I'm not inquiring of any confidential information your client may have given you, but did you ask your client for any personal information about him at all?

"A. Since it was on the petition I asked him why the Department of Social Services has custody."

investigation and had *not* received it in confidence from Hall would obviously want to follow it up, both (1) for the purpose of seeing whether Hall's mode of life and circle of companions revealed a possibility of relations with his killer that could be put to use in Mickens' defense, and (2) for the purpose of anticipating and forestalling or rebutting family-centered victim-impact evidence of the sort likely to be presented at the sentencing phase of a capital trial involving a 17-year-old victim.[64] Saunders did not follow the information up—and could not, because of his conflict. In fact, Saunders did literally **no** investigation of Hall's background, proclivities, or life circumstances, although (a) a defensive strategy aimed at raising a reasonable doubt as to whether Hall consented to have sex with his killer could have eliminated the sole basis for a capital conviction (or dissuaded the prosecutor from insisting on a trial at which a death sentence could be sought, instead of engaging in negotiations looking to a lesser sentence[65]); (b) the location of Hall's body and other evidence suggested the likelihood that Hall had accompanied his killer to that out-of-the-way site for a sexual liaison;[66] (c) information in the Commonwealth

[64] Victim impact evidence is admissible in Virginia capital sentencing hearings. *Weeks v. Commonwealth*, 248 Va. 460, 476, 450 S.E.2d 379, 389-390 (1994). *Weeks* was foreshadowed in *George v. Commonwealth*, 242 Va. 264, 281-282, 411 S.E.2d 12, 22-23 (1991), which relied on *Payne v. Tennessee*, 501 U.S. 808 (1991).

[65] Saunders testified that the prosecutor closed the door to any possibility of plea negotiation at the outset (JA 223-224; see JA 152-153) and the district court found that this was so (74 F. Supp.2d at 609). However, the district court went on to recognize that "[o]f course, it is possible that evidence of a consensual encounter or adverse information about Hall might have prompted a willingness to negotiate" (*ibid.*) and it rejected *that* possibility only on the theory that "strategies based on those concepts were neither plausible nor viable." (*Ibid.*) We explain at pages 44-46 *infra* why the latter theory is radically unsound.

[66] As summarized by the district court: "Mickens points to the following facts that made consent a plausible defense strategy: (a) there

Attorney's file and in a newspaper article available to the defense raised the question whether Hall was not only "on the street" but engaging in homosexual prostitution;[67] and (d) information in the Commonwealth Attorney's file also suggested that Hall had a frightening encounter with a prostitute (whose gender cannot be ascertained on this record, because of Saunders' failure to make inquiries of any of three named individuals who might have jump-started an investigation of that subject) very near the place and time of his murder.[68] In all, the federal district court below—while finding a consensual-sex defense strategy "foreclosed" for

were no 'defensive' stab wounds; (b) there was no evidence that Hall was forced to the secluded area where he was found; (c) there were rumors that Hall was a male prostitute and that the area where Hall's body was found was a known gathering place for homosexuals; (d) there was no blood mixed with Mickens' semen stain on the mattress; and (e) the mattress where Hall's body was found had been used for sexual activity in the past." (74 F. Supp.2d at 607.) Judge Payne went on to say that "[e]ven if it is assumed that those five facts would have supported a consent defense, the record shows that other facts foreclosed presentation of consent as a plausible alternative defense strategy." (*Ibid.*) He rated "most importantly" among the latter facts the fact that "Mickens repeatedly professed that he had no involvement with Hall in any way." (*Ibid.*) We discuss at pages 44-46 *infra* why the idea that Mickens' denial of involvement "foreclosed" a consensual-sex defense is untenable. And the *other* "foreclosing" facts recited by Judge Payne (at *ibid.*) are simply facts from which an inference contrary to a consensual-sex scenario *might or might not* be drawn. Even if the issue were one of determining which scenario should be inferred on a fully developed record, the choice would not be foreordained. And of course that is not the issue. The issue is whether an *investigation which Saunders did not begin to conduct* into the possibility of a consent defense which the present record therefore can only imperfectly reflect was "a plausible alternative defense strategy."

[67] See note 21 *supra*.

[68] See note 23 *supra*. Other information in the file pointed to the possibility that at the time of Hall's death he was "ducking three guys" who had come looking for him to collect money he owed them. See text and note at note 22 *supra*.

reasons we will discuss at pages 44-46 below—concluded that Saunders' investigation of other possible defensive theories was deficient. (74 F. Supp.2d at 610-611 [one lead "should have been pursued" and was not; Saunders' "reasons for refusing to pursue [other leads] . . . are not defensible"].)

The district court put these deficiencies aside, in appraising Mickens' conflict-of-interest claim, because it could not determine that the conflict *caused* the deficiencies. Of Saunders' failure to pursue one line of investigation, the district court wrote: "The record discloses no reason for the failure to follow that lead other than Saunders' lack of perspicacity or perhaps indolence. Neither of those reasons bespeaks that he failed to act because of his previous representation of Hall." (*Id.* at 610.) As for Saunders' "refusing to pursue [another line of] evidence which pointed to the existence of an alternative perpetrator":

> "Mickens must do more than show that Saunders could, or should, have pursued a promising lead. He must also establish some link between the asserted actual conflict and the decision to forego further investigation of the lead. . . . Mickens has 'the burden of proving through a preponderance of the evidence' that Saunders 'would have' pursued the Thrash and Fleming leads 'but for' Saunders' professional relationship with Hall. . . . This, he has failed to do." (*Id.* at 611-612.)

All of this reasoning was adduced to support the district court's conclusion that Mickens had failed to show any "adverse effect" flowing from Saunders' representation of Hall, so it fails on the *legal* ground that "adverse effect" is irrelevant once an actual conflict of interests is found in a *Wood* situation. (See Part I.A above.) But a deeper problem with the reasoning is that it is incompatible with the basic premise of the Sixth Amendment [69] that a criminal defendant

[69] See, *e.g.*, *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 438 (1988) ("In preparing and evaluating the case, and in advising the client . . . , counsel must consistently serve the client's interest to the best of his or her ability."); *Smith v. Robbins*, 528 U.S. 259, 278 (2000) ("[A]n indigent does, in all cases, have the right to have an attorney, zealous for the indigent's interests, evaluate his case and attempt to discern nonfrivolous arguments."); *Powell v. Alabama*, 287 U.S. at 59 ("It is not enough to assume that counsel [functioning under circumstances of diffused responsibility and inadequate opportunity to prepare] . . . thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts."); *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice.").

with his or her life at stake will have the services of dedicated, conscientious counsel.[70] Consistently with that premise, the rule cannot possibly be that when a conflict-ridden lawyer has *incomprehensibly* failed to pursue investigative leads which should have been pursued, and when a postconviction court is left in equipoise between the only two explanations for this failure—the lawyer's conflict or some speculative "indolence" or "lack of perspicacity"—the conflict claim should be rejected on the ground of this motivational ambiguity.

Three objective facts are patent on the record here and make the mysteries of Bryan Saunders' motivations immaterial. (A) Saunders had leads to information about Timothy Hall's background and circumstances that he was forbidden to use in the defense of Walter Mickens because he

[70] See, *e.g.*, AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908), quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854) (A lawyer "owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied."); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Comment [1] to Rule 1.3 (1999), quoted in text at note 56 *supra*.

had obtained them as Hall's lawyer; (B) any conflict-free lawyer defending Walter Mickens would have undertaken an investigation of those aspects of Hall's background and circumstances, terminating it only if and when s/he developed information which—in his or her professional judgment *guided solely by Mickens' interests*—made it prudent to forgo further investigation; and (C) Saunders undertook no such investigation. This is to say that Saunders *limited* his investigation *although his duty to Hall*, which disabled Saunders from attending solely to Mickens' interests in deciding whether or not to pursue Saunders' unfavorable information about Hall, *ethically forbade Saunders to make the only judgment that could properly have justified such a limitation.* See *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984) ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").[71] It is the inherent insolubility of Saunders' ethical dilemma—whether or not he subjectively "struggled with the ethical issues" (74 F. Supp.2d at 605)—that constituted an actual conflict of interests.

This conclusion cannot be avoided by supposing, as the district court did, that much of the "information [which Saunders failed to pursue] was irrelevant to Mickens' defense" (74 F. Supp.2d at 606). The district court's determination of irrelevancy rests on two related grounds. First, the court discerned no evidence in this record to "suggest that [Hall] . . . was a prostitute, much less that he consented to

[71] When strategic choices made by *unconflicted* counsel are challenged as incompetent, *Strickland* holds that they are entitled to "a heavy measure of deference." (*Id.* at 691.) But that is precisely because an unconflicted lawyer "is strongly presumed to have . . . made all significant decisions in the exercise of reasonable professional judgment." (*Id.* at 690.) And the uniform teaching of *Holloway*, *Sullivan* and *Wood* is that a conflict of interest makes that presumption untenable by eroding its first premise.

have sex with Mickens." (*Id.* at 604.) Second, it believed that Mickens' testimony denying any involvement in Hall's murder made a consensual-sex defense non-viable.[72] Both grounds are analytically untenable.

The first ground constitutes an impermissible bootstrap lift, of the sort that *Holloway* counsels courts to avoid. (See page 34 above.) The reason why *the present record* contains no direct evidence that Hall was a homosexual prostitute may well be *because* Saunders did not investigate available leads pointing to that possibility. The second ground has the same problem. The reason why Mickens testified as he did at trial may well be *because* he was deprived of the assistance of conflict-free counsel who, after conducting a proper investigation and evaluating the relative potential of alternative defensive options, would have been in a position to confer with Mickens about those options—including options that did not involve Mickens taking the witness stand, as well as options that could have resolved the prosecution with no trial at all. The second ground also has the problem of assuming, baselessly, that after adequate investigation and fact development, a capable lawyer in Mickens' case could not have argued at trial *both* that Mickens was not the person who killed Hall *and* that the prosecution had failed to prove beyond a reasonable doubt that **whoever** killed Hall did so in the course of an attempted forcible sodomy rather than after attempted consensual sex. *Some* criminal defense attorneys might regard such alternative defenses as relatively weaker than a single-theory defense in *some* cases—depending on the specific facts unearthed by investigation—but that is a far cry from supporting the district court's view that Mickens'

[72] See *id.* at 606 with a cross-reference to *id.* at 607; and see *id.* at 606 n. 15: "For example, Hall's criminal history might have had some relevance to Mickens' case, if Mickens' testimony had not foreclosed any theory of self-defense."

testimony of non-involvement categorically "foreclosed any theory of self-defense" (74 F. Supp.2d at 606 n. 15).

In short, as the panel majority below perceived, "[t]he district court erred as a matter of law [in concluding that Saunders suffered no actual conflict of interest] because it focused too narrowly in describing the circumstance . . . where confidential information might be relevant or useful . . . . The proper inquiry . . . is whether Saunders' interest (or duty) in maintaining Hall's secrets and confidences diverged from Mickens' interest in pursuing a . . . reasonable pretrial investigation." (227 F.3d at 215-216.) Throughout his investigation of defensive options on behalf of Walter Mickens, Saunders "actively represented conflicting interests." (*Sullivan*, 446 U.S. at 350.) That is the defining feature of an "actual conflict of interest" (*id.* at 349) and suffices to entitle Mickens to relief under *Wood*.

II. IF A SHOWING OF ADVERSE EFFECT WERE REQUIRED, IT WOULD NOT BE THE ONE THE FOURTH CIRCUIT USED TO DENY POSTCONVICTION RELIEF IN THIS CASE

Even if the *en banc* majority below had not erred in requiring Mickens to show an "adverse effect" as well as an actual conflict of interests, its application of the adverse-effect requirement to this record would be unsustainable. The Fourth Circuit's (and the district court's) approach to "adverse effect" misreads *Sullivan*, disregards the basic insight of *Holloway*, and blurs the clear line between this Court's conflict-of-interest jurisprudence and its general ineffective-assistance-of-counsel jurisprudence.

The Fourth Circuit construed the "adverse effect" prong of *Sullivan* as obliging Mickens to prove a cause-and-effect connection between "the actual conflict" harbored by Saunders and Saunders' "failure to pursue [a viable defense] . . . strategy or tactic." (240 F.3d at 361; see pages 19-21 above.) This meant, in the Fourth Circuit's view, that Mickens' claim to postconviction relief foundered on the adverse-effect prong whenever the district court found that an aspect of Saunders' performance either (A) was "unrelated" to Saunders' conflict in the sense that the conflict did not motivate Saunders to behave as he did, or (B) was a course of behavior that a competent, unconflicted lawyer might have chosen to take. (See text and notes at notes 33-35 *supra*.)

Sullivan does not—in the cases where it requires a showing of adverse effect—require *this* kind of showing. The showing demanded by the Fourth Circuit conflates "adverse effect" with prejudice, while *Sullivan* takes pains to distinguish the two. (446 U.S. at 349-350.) *Sullivan*'s "adverse effect" inquiry is whether "a conflict of interest actually affected the adequacy of . . . [the defendant's] representation" (*id.* at 349). Its focus is *impeded representation*, not simply whether the lawyer was illicitly motivated to act in a way that damaged his or her client's interests.

Doubtless, in some situations it may happen that the way in which a conflict of interests impacts upon the quality of a client's representation is that it induces the lawyer to take action inimical to the client's interest. But that is not always so; and it needs not be so in Walter Mickens' case. Here, Saunders' continuing duties to his former client, Hall, *ethically precluded* Saunders from evaluating lines of investigation into Hall's history and circumstances, potentially relevant to Mickens' defense, *unfettered by obligations of loyalty to anyone other than his present client, Mickens*. In this situation, Saunders' subjective reasons for his investigative decisions are irrelevant, because he could not have made *any* decisions on this subject—for *any* reasons—without violating ethical constraints. If he considered only Mickens' interests in deciding whether to pursue information about Hall that he had acquired as Hall's lawyer, Saunders violated his responsibilities to Hall. If he did *not*, he violated

his responsibilities to Mickens. Whatever his subjective motivations may have been, the objective fact is that he was ethically *forbidden* to adopt the only motivational stance that a lawyer representing Mickens was permitted to have—a stance of undivided loyalty to Mickens. This "affected the adequacy of [Mickens'] . . . representation" in the most basic way.

The Fourth Circuit's misapplication of the adverse-effect requirement was compounded by two additional errors. First, like the district court,[73] the *en banc* majority of the Court of Appeals accepted the record made by Saunders himself as constituting ultimate, unchangeable reality for the purpose of determining whether any of his failings harmed Mickens. (See text and note at note 36 *supra*.) Thus, the *en banc* majority endorsed the district court's finding that "Mickens denied ever meeting Hall," and it reasoned from this that "[b]ecause Saunders was entitled to rely on the information provided by his client, consensual sodomy was not a viable defense strategy at the time that Saunders made his decision not to pursue it." (240 F.3d at 261.)[74] It would be more

[73] See notes 28 and 36 and pages 15-16 *supra*.

[74] It offered a second ground for the same result: "[t]he district court concluded that a consent defense was not viable because of evidence that Hall had been subjected to a choke hold and stabbed some 140 times before or during the act of sodomy or attempted sodomy." (240 F.3d at 261.) The district court's version of this reasoning was that "there were blue marks on Hall's neck which evinced use of a choke hold on Hall, a circumstance inconsistent with consent. . . . [Also,] the bloody transfer stains on the back of Hall's thighs indicated that the attacker stabbed Hall before or during the attempted sexual activity, thereby making consent a rather implausible alternative theory. As Keeling, Mickens' other counsel, remarked, 'I would imagine that when the choking of the victim or the stabbing of the victim started happening that [any] consent would have been revoked.' " (74 F. Supp.2d at 607.) The reasoning fails for lack of a necessary premise. It assumes the jury must have found from the physical evidence that the choking and stabbing of Hall preceded or accompanied the sexual activity constituting attempted forcible sodomy. This was a possible jury finding, but so was the converse: that Hall's attacker was incited to homicidal fury by something that happened *after* sex play ended unsatisfyingly. The medical examiner expressed no opinion as to when the choke marks were inflicted in the sequence of events (except that, if they were inflicted *post mortem*, it would have had to be shortly after death) (JA 86); she could not draw any inferences about the relative timing of Hall's wounds (JA 71; see also JA 87); and the crime scene technician who described the transfer stains offered no opinion as to what caused them (JA 16-17). Even if they resulted from Hall's killer straddling Hall's body, there is no particular reason to believe that the killer was attempting sexual activity rather than pinioning Hall while stabbing him.

accurate to say that *unconflicted* counsel are entitled to *choose* whether they will rely on information from their clients or conduct an independent investigation. Some choose the latter course and obtain information which they use effectively in counseling their clients with respect to defense options that include theories not based upon the client's testimony. Some choose the former course, in some situations. But *conflicted* counsel are in no position to make such choices in their clients' interests; so a record resulting from conflicted counsel's failure to investigate is an unreliable basis for determining whether uninvestigated defense strategies were viable. (*Holloway*.)

Second, as is manifest in the passage just quoted, the Fourth Circuit *en banc* majority essentially held that Saunders' conflict would not be deemed to have had an adverse effect on Mickens' case if an unconflicted lawyer might have followed the same course of action Saunders followed, and if s/he would not be held incompetent for doing so. (See text and note at note 34 *supra*.) This standard of "adverse effect" makes the Sixth Amendment conflict-of-interest rules laid down by *Sullivan* a study in superfluity, displaced by *Strickland*'s ineffective-assistance standards for *unconflicted* counsel. Besides scuttling *Sullivan*, it flies in the teeth of *Strickland*'s own recognition that conflict-of-interest cases are *sui generis* (466 U.S.at 692-693).

CONCLUSION

The decision below denying Walter Mickens, Jr. post-conviction relief is wrong and should be reversed.

Respectfully submitted,

ROBERT E. LEE
MARK E. OLIVE
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(804) 817-2970

ROBERT J. WAGNER *
LAURA L. WAGNER
WAGNER & WAGNER
700 East Main Street,
Suite 1630
Richmond, VA 23219
(804) 644-3321

* Counsel of Record